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In the Supreme Court of the United States.

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HOMER BIRD, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 306.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

This murder was committed September 27, 1898, at a point on the Yukon River about 600 miles above its mouth (Rec., pp. 1 and 2). The grand jury of Alaska returned an indictment against the defendant on the 9th day of November, 1899. The defendant was tried, convicted, and on December 13, 1899, sentenced to be hanged. On February 25, 1901, the Supreme Court reversed the judgment of said district court and remanded the cause to the said district court with direction to set aside the verdict and award a new trial. A new trial was had in accordance with said mandate, the defendant again convicted, and on March 3, 1902, again sentenced to be hanged.

It appeared from the evidence that the defendant originally came from the city of New Orleans, where,

in March, 1898, he joined with Charles Sheffler, R. L. Patterson, and the deceased, J. H. Hurlin, in a prospecting tour for gold in the Territory of Alaska. The four men each agreed to furnish $500, but Sheffler failed to put up his quota, and Bird furnished about $1,000, and the remainder of it was contributed by Hurlin and Patterson. The party started from San Francisco, and were accompanied by a woman by the name of Naomi Strong, who seems to have been Bird's mistress. The party equipped itself with a small steam launch and a scow with provisions. They sailed from San Francisco May 21, 1898, reached St. Michael in July, and about a week later started for the Yukon River. In September, when they were at a point on the Yukon River, they determined to go into winter quarters. It is apparent from the testimony that during the progress of the journey serious difficulties had arisen between the partners, which were partly due to differences of opinion as to the respective shares of the partners in the joint enterprise and to the quarrelsome disposition of the defendant.

As a result of these differences, Sheffler, Patterson, and Hurlin determined to leave Bird and the woman, but at Bird's request agreed to remain until a cabin, which they were constructing for winter quarters, could be finished.

The tragedy, which occurred on the morning of September 27, is best described by Naomi Strong (Rec., p. 79):

Q. They all got up before you—all of the men—and got away from the boat, did they?

A. Yes, sir; they always got up before I did.

Q. Did Bird get up before you that morning?

A. Yes, sir; he got up.

Q. When they got up, where did they go, if you know?

A. Mr. Patterson and Sheffler and Hurlin went up to cut some timbers to roll the barge off the beach; the barge was on the beach—half of it—and Mr. Bird went up to work on the cabin; the cabin wasn't completed quite, and he went up to work on the cabin, I believe.

Q. What did you do?

A. I was preparing breakfast.

Q. How long was you preparing breakfast, from the time you got up until you called them to breakfast?

A. I don't remember the time; it was 9 or 10 o'clock. It took me about an hour or half an hour till I got things prepared to call them to breakfast.

Q. You had had coffee earlier in the morning?

A. Yes, sir; we always had.

Q. What had you cooked for breakfast?

A. Oatmeal and some bacon, I believe.

Q. When you called them to breakfast, where were these men, Sheffler, Hurlin, and Patterson?

A. They were out working with these timbers.

Q. Were they within calling distance?

A. Yes; but Mr. Bird was up to the cabin.

Q. When you called them what did they do?

A. Mr. Sheffler went up and called Mr. Bird first, I believe, to come down, they were ready

to divide the provisions; and then while they were out talking Mr. Bird took his own time to come down—and while they were out there talking, I called them to breakfast.

Q. When you called them they immediately came on board?

A. I think Sheffler and Patterson came first. I don't remember; then Hurlin and Bird was the last, I believe.

Q. When Bird came in where did he seat himself?

A. On his bed, on the couch—the bunk.

Q. What did he do—what did you see him doing, if anything, on the couch?

A. He was sitting there figuring with a piece of paper.

Q. Did he have anything else there besides papers?

A. Not that I saw.

Q. He was figuring with a paper. Now, when these three men came on board, where did they sit down, or stand up?

A. They sat down.

Q. Where?

A. Back in the stern of the boat; I sat down; Mr. Hurlin and Mr. Patterson and Mr. Sheffler sat down in a row, and I sat opposite of Mr. Hurlin.

* * * * *

Q. Now, when these men took their seats, as I understand it, they were in the order, Patterson on the right, Sheffler in the center, and Hurlin on the left?

A. Yes, sir.

Q. Did you serve them with any food?

A. Yes, sir; I gave them breakfast.

Q. What did you give them?

A. Oatmeal first.

Q. In what kind of a vessel?

A. In a tin plate.

Q. They had oatmeal in the tin plate, did they?

A. Yes, sir.

Q. You say you sat opposite these men?

A. Yes, sir; Sheffler and I were talking about a trap I had set to catch some grouse, and——

Q. Now, what was——

A —— we were talking about it, and all at once I heard Mr. Bird's gun click—shotgun—when he broke it it clicked, of course, and I looked up and he had the gun to his shoulder, and in the meantime Mr. Sheffler looked around; I think he fired at Mr. Hurlin, and then Sheffler looked around and held up his hands and told him for God's sake not to shoot him, and I jumped up after he had fired at Hurlin, and Mr. Patterson kind of jumped back of me—jumped behind me like, and I asked Bird not to shoot; he had the gun to his shoulder all the time, and I jumped and run; put my hands over Patterson's shoulder and run through the boat, and just as I passed him in the boat he fired at Patterson, and Patterson jumped overboard; whether the shot struck him when he jumped overboard I don't know, and in the meantime I jumps out on the beach, and Mr. Patterson jumps overboard, and Mr. Bird comes running out, climbs over the

bow of the boat with two guns in his hands—his own and Mr. Sheffler's—and heads Patterson off; the boat was in the water, just kind of half on the beach and half in the water, and so Mr. Patterson wades around on the side of the boat to get out, and Bird heads him off and tells him not to come near him, and Patterson kept begging him not to shoot him, and Bird up with his own gun again and says: "Bob, you dirty ———, you're the cause of this," and shot at him the second time, and Patterson came to the beach. (Witness breaks down and sobs.)

Q. Well, compose yourself, Mrs. Strong, if you can, and go on and state what occurred there. What happened when Mr. Patterson got to the beach?

A. They were all on the beach then, and he begged Bird not to shoot him.

Q. What did he say to them?

A. He held out his hands and told him for God's sake to think of his poor family.

Q. What did Bird say?

A. I don't remember any more what he did say. I think he said, "Bob, I have thought of our families," or something like that.

Q. At the time he fired at Hurlin did you see what Mr. Hurlin did? Immediately after, as far as Hurlin was concerned—immediately after the shooting of Hurlin—what followed? [Witness sobs.] What did he do, Mrs. Strong?

A. Mr. Hurlin?

Q. Yes.

A. He never moved at all; he sat in the same position when he was shot.

Q. Did his body change position at all?

A. No; just remained that way for quite a while.

Q. Did you see any evidence of a wound on Mr. Hurlin, anything——

A. I saw there was a hole in his head right here, the left side.

Q. What position was his head in?

A. Leaning over this way, with his hands like this, and his plate in his lap.

Q. What did you see in his plate?

A. Blood and brains. [Witness sobs.]

* * * * *

The murder was therefore an inexcusable atrocity, and unless the defendant has been illegally convicted his sentence should stand.

In support of his appeal the appellant has filed 19 assignments of error. Many of these are trivial, and not alluded to by appellant in his brief. In replying to this brief each assignment of error will be considered in the order observed by the appellant, and it will be assumed that those not considered by him have been abandoned.

1.

JURISDICTION OF TRIAL COURT.

The act of Congress of May 17, 1884, entitled "An act providing a civil government for Alaska," established a district court for said district with the civil and criminal jurisdiction of district court of the United States, and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit courts and such other jurisdiction,

not inconsistent with this act, as may be established by law. (23 Stat. L., 24).

The crime was committed and the indictment against the defendant found while the above act was in force.

On March 3, 1899, and prior to the first trial in this case, Congress passed "An act to define and punish crimes in the district of Alaska and to provide a code of criminal procedure for said district." (30 Stat. L., 539.) Section 219 of Title One of that act provides "That nothing herein contained shall apply to or in any way effect any proceeding or indictment now found or pending, or that may be found, for any offense committed before the passage of this act." It is conceded by appellant that said act of March 3, 1899, is still in force in said district. He contends, however, that the act of June 6, 1900, entitled "An act making further provision for a civil government for Alaska, and for other purposes" (31 Stat. L., p. 321), in effect deprives the district court of Alaska of jurisdiction of indictments returned into that court prior to the passage of that act; that is, prior to the reorganization of that court under the provisions of said act. He further contends that the district court as reorganized, notwithstanding the provision of section 219 of the criminal code previously quoted, is limited in its jurisdiction in criminal matters to offenses embodied in that code.

If the legislative intent is to govern, then the reorganized district court had jurisdiction of the indictment herein and jurisdiction of all criminal causes

pending at the time of the passage of the civil code. Chapter one of the criminal code provides:

> SEC. 1. That the district of Alaska consists of that portion of the Territory of the United States ceded by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven.
>
> SEC. 2. That the crimes and offenses defined in this act, committed within the district of Alaska, shall be punished as herein provided.

Said Mr. Justice Field, in *Patterson* v. *Tatum* (3 Sawyer, 164),

> The proposition of counsel that a statute is impliedly repealed by a subsequent act revising the whole matter of the first, is undoubtedly correct. The authorities are numerous to that effect. Two cases recently decided by the Supreme Court of the United States, in addition to those cited by counsel, establish this position—that of the *United States* v. *Tynen* (11 Wallace), and that of *Henderson's Tobacco*, in the same volume. But the implication can not arise when the revisory statute itself prescribes its operation upon the previous act; when that is done no other effect can be given to the revisory act, and such was the case in the revisory act of 1846. It repeals such provisions of the original act as were inconsistent with the new act—no other.

Is there anything in the criminal code inconsistent with the provision in section 4 of the civil code conferring upon the reorganized district court general jurisdiction in criminal causes?

We contend that the civil code did not expressly or by implication repeal the criminal code. *All* the provisions of the criminal code still are operative. Any offense committed subsequent to its passage must be prosecuted as therein prescribed. But can it be claimed that an offense committed prior to the passage of that code can not even now be prosecuted under the provisions of law then in force? Are we not to understand that *general* jurisdiction means jurisdiction of all criminal causes and offenses under existing law in the district?

Are we to assume that Congress intended to release all criminals who were being prosecuted when the civil code was enacted? If the district court had no jurisdiction in this cause it had no jurisdiction in any criminal cause pending when the civil code was enacted. The last section of the civil code provides:

> No person shall be deprived of any existing legal right or remedy by reason of the passage of this act, and all civil actions or proceedings commenced in the courts of the district before or within sixty days after the approval of this act may be prosecuted to final judgment under the law now in force in the district, or under this act. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Read this section in connection with section 219 of the criminal code and it is clear that Congress did not deem it necessary in the civil code to refer to criminal causes then pending and entitled in the district court

prior to its reorganization. It was unquestionably the legislative understanding that the civil code in no way affected the criminal code or the criminal causes then pending.

All the cases cited by appellant in support of his contention concern conditions entirely unlike those existing in this case. Here we have a law the object of which as set forth in its title was to make *further* provisions for a *civil* government for Alaska. The Federal authority was not relinquished to a newly created State sovereignty. The Federal court continued to be the sole judicial tribunal therein. To be sure that court was reorganized, but its character and jurisdiction remained the same. It continued to be the district court of Alaska.

It would, indeed, be an anomalous situation if prosecutions for offenses committed either before or subsequent to the enactment of the criminal code and prior to the enactment of the civil code could originate in the reorganized district court, but all criminal causes entitled in the district court prior to the enactment of the civil code should fall for want of jurisdiction.

To admit the existence of such an anomalous situation is to give a strained and unreasonable interpretation to the language used in the act of June 6, 1900—an interpretation not contemplated by Congress.

Appellant comments upon the provisions in the last section of the act of June 6, 1900, that "all civil actions or proceedings commenced in the courts of this district before or within sixty days after the approval

of this act may be prosecuted to final judgment under the law now in force in that district or under this act." Where prosecuted? In what court? Not in the old court, but in the reorganized court. The act made no provision for the transfer of *civil* causes from the old court to the new. It simply provided in effect that inasmuch as the civil procedure of the district was changed by the act, such change should not affect pending civil causes. As the act made no change whatever in the criminal procedure, or in the criminal law of the district, Congress for obvious reasons did not deem a like provision with reference to criminal causes necessary. Appellant, at page 12 of his brief, in discussing the status of criminal causes, says: "The records and files of the old court are not made records and files of the new court." We answer that Congress did not make "the records and files of the old court" in *civil* causes the records and files in the new.

Nor was it necessary, for, as we have before said, a new court in the sense contemplated by appellant had not been created. If, as we have contended, the provisions of section 219 of the criminal code are still in force in the district, this cause has been in no way affected by the act of June 6, 1900, and the trial of defendant was properly had under the law in force prior to the enactment of the criminal code.

2.

SELECTION OF JURY.

It appears by the record "that on the 9th day of November, 1901, and during the Skagway term of

court, Charles D. Rogers, a prominent member of the principal political party opposed to that to which the Hon. W. J. Hills, the clerk of the court, belonged, was by the court appointed a jury commissioner for the Juneau, December, 1901, term of court." Appellant concedes that said jury commissioner was a person properly appointed and qualified to act as such. It also appears in the record (p. 13) that W. J. Hills, clerk of the United States district court for the first division of the district of Alaska, on the 13th and 14th days of November, 1901, "did in connection with Charles D. Rogers, commissioner appointed to select jurors for the Juneau, December, 1901, term of that (this) court, deposit in the jury box the names of three hundred men" believed by them to be qualified jurors for the first division of the district of Alaska. A certificate to that effect was signed by said Hills as clerk of said court and by said jury commissioner Rogers.

Notwithstanding that the record affirmatively shows that all the requirements of the statute were complied with up to the time the three hundred names were placed in the box, we are asked to presume that the words "in connection with" mean in a manner other than the statute prescribed. The proper number of names of jurors were selected at the proper time, by the proper persons, and, unless we assume what the record does not even suggest, in the proper manner.

In criminal cases the same principles of presumption obtain generally, and with the same

> validity, to uphold a judgment of conviction: and where the record shows a plea, in bar, of former conviction, and another of not guilty, the former is presumed waived.
>
> So it will be presumed that a magistrate acting in accordance with the terms of a statute, and that the clerk properly entered the appearance of an accused and indorsed the plea of not guilty, and that the accused was properly arraigned. (Encyclopedia of Pleading and Practice, vol. 2, p. 497.)

In *Ball* v. *United States* (140 U. S., 132) Mr. Chief Justice Fuller said:

> We do not think that the fact of the presence of the prisoners can by fair intendment be collected from the record, no mention being made to that effect in the order, it not appearing therefrom that the sentence was read or orally delivered to them, and the usual question not having been propounded.

In this case the fact that the names of jurors were properly placed in the box "can by fair intendment be collected from the record."

3.

LIST OF WITNESSES.

It is conceded by the defendant that a list of the jury and of the witnesses was seasonably furnished him. He complains, however, because some name other than Noami Strong was not used to designate that witness. The record shows that her maiden name was Noami Strong; that she had been married and divorced, and that after her divorce she resumed her

maiden name. The record further shows that Noami Strong was her true name. (Rec., p. 73.) It shows further that she was known to the defendant under that name when she first met him in New Orleans (p. 74); that she testified under that name in the first trial (p. 73). It is difficult to understand wherein the defendant was injured. The witness was known to him by that name; she had testified under that name at the former trial, and he had had ample time and opportunity to make inquiries concerning her. He had no difficulty in associating the witness with the name by which she was designated in the list of witnesses. In fact, the defendant was inquired of by his counsel, Mr. Maloney (Rec., p. 107), whether he was acquainted with Mrs. Strong, and he answered, "Yes sir."

The Government certainly ought not to be deprived of the testimony of an important witness on the *theory* that the name by which that witness has been known for years is not the true name of the witness. There is absolutely nothing in the record to warrant the assumption of appellant that the name of this witness was not Naomi Strong.

4.

SIXTH ASSIGNMENT OF ERROR.

After presenting to the jury the two theories of the case, that for the Government and that for the defendant, the court said (Rec., p. 151):

> But in determining this matter under the *evidence* before you, you must consider the situation of the parties at the time, and all the

> surrounding circumstances, together with the testimony of the witnesses for the prosecution, as well as the *evidence* of the defendant.

The whole testimony in the case is first referred to by the court in this portion of his charge to the jury as "the *evidence* before you." He, in effect, tells the jury to consider *all* the evidence and *all* the surrounding circumstances in reaching their verdict. No jury of ordinary intelligence could have been misled because the court, after speaking of all the testimony in the case as *evidence*, alluded to the *testimony* of witnesses for the prosecution and the *evidence* of the defendant.

5.

THE EIGHTH ASSIGNMENT OF ERROR

Relates to the refusal of the court to instruct the jury as therein requested by the defendant. Appellant is clearly wrong in his premise that the court in effect excluded from the jury the testimony of Delaney, Gurr, and Condit, witnesses for the defense, who answered certain hypothetical questions concerning the effect of gunshot wounds. The court's instructions to the jury covered every essential element in this request, and was entirely fair and could not have misled the jury. The request assumed that the shot in the charge fired at Hurlin "were all stopped by the head of the deceased," an assumption not warranted by the evidence. This was, of course, known to the court.

Noami Strong under cross-examination testified as follows (Rec., p. 97):

> Q. Did any of the missiles from the shot—the first one—strike you at all?

A No; it didn't strike me at all.

Q. Did it strike any place in the back part of the boat?

A. There was some shot; Mr. Bird found a shot in my cup; two, I think, and more on the floor.

Q. How do you know?

A. He gave them to me.

Q. How do you know he found them?

A. I saw him when he picked them up.

This statement was not denied by the defendant in his testimony. In view of the theoretical and conflicting testimony of these three witnesses for the defendant, met as it was by the positive and uncontradicted statement of Mrs. Strong and the evidence introduced in rebuttal, the court properly declined this request of the defendant.

6.

ESCAPE OF DEFENDANT.

When the Government offered to prove the escape, the following issued (Rec., p. 104):

Q. Did anything occur during his confinement there with reference—that is, with reference to Bird?

A. Yes, sir.

Q. Out of the ordinary?

A. Yes, sir; he made his escape.

(Counsel for the defendant object to the testimony on the ground that it is too remote for the occurrence in question, and there are too many intervening causes to make it material.)

Q. I will withdraw that question for the moment, and I will ask a preliminary question: Under what charge was he committed to your care?

A. On the charge of murder.

Q. The charge on which he is being tried?

A. Yes, sir.

Q. Now, then, how long after you had confined him in this jail, and had him in custody, was it before this jail break was made?

(Counsel for the defendant object to any evidence being introduced on that point, because it is too remote from the occurrence which is alleged to have been committed and the time the arrest was made, and there may be a great many intervening causes for the escape, if it was effected.)

By the COURT. I quite often agree with counsel on matters of this kind, but I can not agree with his views now. The time that had expired and the circumstances surrounding the parties may indeed affect the weight or value of such testimony; but it does not affect its relevancy, materiality, or competency for whatever it may be worth. Of that the jurors are the judges. That is at least my view of the question, and the objection is overruled.

(Exception.)

Q. How long had he been in confinement before the jail delivery was effected?

A. A little over three months. He was confined between the 15th of June and sometime along about the 1st of July he was turned over to me, and he escaped the 1st day of October, and was gone three days.

The language employed by the court upon the subject of the escape of the defendant, considered in connection with the evidence of the escape and the remarks of the court when that evidence was offered, was certainly less open to objection than the language of the court in discussing a like subject in *Allen* v. *United States* (164 U. S., 498), which this court upheld.

The escape of the defendant "*was* made after many months of confinement and escape comparatively without danger." Surely the charge, under the circumstances, could not have misled the jury.

7.

ACCOMPLICE.

The ninth assignment of error relates to the refusal of the court to instruct the jury on the subject of accomplices. Appellant up to this point has proceeded on the theory adopted by the Government that this trial was properly held under the law in force prior to the enactment of the criminal code. He now discovers that under the provisions of section 153 of Title Two of that code the testimony of an accomplice must be corroborated, and he immediately, and at the risk of being inconsistent, invokes the aid of that section. We contend that under section 219 of Title One of the criminal code this trial was in no way affected by the provisions of said section 153. If this contention is correct we are governed by the rule of the common law.

At common law a conviction may be had upon the uncorroborated testimony of an accomplice.

> Am. & Eng. Ency. of Law (2d ed.), vol. 1, 399–401; 1 Phil. Ev., 89; 1 Greenl. Ev., s. 380; 1 Bish. Cr. Proc., s. 1169; 1 Chit. Cr. L., 604; Underhill on Criminal Evidence, p. 90. "It has always been held that a jury might, if they saw fit, convict on the uncorroborated testimony of an accomplice." (Gray, C. J., in *Commonwealth* v. *Holmes*, 127 Mass., 429.) "There is no rule of the common law nor of the statute law of this State that a person shall not be convicted on the testimony of an accomplice unless corroborated by other evidence." (*State* v. *Dana*, 59 Vt., 614.) "In *State* v. *Hang*, 2 Dev., 7 Bat., 390, the supreme court of North Carolina declared what we understand to be the true rule upon the subject. The practice of giving such instruction or advice to the jury, it is there said, rests in the discretion of the presiding judge, and his refusal so to do is not assignable as error." (*Cheatham* v. *The State*, 67 Mississippi, 344.)

Assuming that the provisions of section 153 of the criminal code were operative in this trial, we contend that there was absolutely no evidence in this case upon which to predicate the charge prayed for. If we adopt the story of the defendant himself, neither Mrs. Strong nor Sheffler knew that this murder was to be committed. It is not claimed by defendant that either took any part in its commission. The defendant even admits that immediately after the shooting of Hurlin

and Patterson, Sheffler "went down on his knees" to him. (Rec., p. 118.) From all the testimony it is perfectly clear that Sheffler was in great fear that the defendant would kill him also. In fact the defendant says (Rec., p. 118) he told Sheffler that he (Sheffler) "was as deep in the mud as the others were in the mire." Sheffler then had every reason to believe that he was liable at the hands of the defendant to meet the same fate that had befallen his companions. He was in a strange and unsettled country, without money and without friends, in an extremely dangerous situation, and far from the protecting arm of the law. Can we say that he was not entirely justified in not openly proclaiming the guilt of the defendant until such time as his own danger was less imminent? There is not a scintilla of evidence that either Mrs. Strong or Sheffler concealed this crime. The evidence does show that they proclaimed it as soon as their own safety permitted.

The most appellant claims from the evidence is that Mrs. Strong and Sheffler were tardy in proclaiming the commission of his crime. Assuming that they might without great danger to themselves have sooner procured the arrest of the defendant, their failure to do so certainly did not constitute them accomplices, for "An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of a crime." (Wharton's Criminal Law, par. 440.) "One who is merely present at the commission of a crime, but in no way aids

or participates therein, is not an accomplice." (Am. and Eng. Ency. of Law, 2d ed., vol. 1, p. 391; *Allen* v. *State*, 74 Ga., 769; *Lowery* v. *State*, 72 Ga., 649; *State* v. *Reader*, 60 Iowa, 527; *State* v. *Cox*, 65 Mo., 29.) Concealment of the fact that a felony has been committed does not render one an accomplice. (*Noftsinger* v. *State*, 7 Tex. App., 301; *Rucker* v. *State*, 7 Tex. App., 549.)

The denial of this prayer was not error.

The record herein discloses the commission of a most brutal murder, absolutely devoid of an extenuating circumstance. The defendant has been twice convicted, and unless there has been such error as to clearly injure him he should suffer the penalty for his crime.

Respectfully submitted.

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CHAS. H. ROBB,
Of Counsel.

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